

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

ROBERT M. WHEELER,

Defendant-Petitioner

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Case No. 3:96-CR-732

OPINION & ORDER
[Resolving Docs. [74](#) & [79](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this [28 U.S.C. § 2255](#) action, Defendant-Petitioner Robert M. Wheeler moves to vacate the sentence the Court imposed after his conviction for causing the death of Rhonda A. Wheeler.¹ Wheeler argues that, in light of *Johnson v. United States*,² his convictions under [18 U.S.C. § 924\(c\)](#) for using a firearm during and in relation to a crime of violence are invalid.³ The United States opposes Wheeler's motion⁴ and moves to dismiss the petition.⁵ For the following reasons, the Court **DENIES** Wheeler's motion and **GRANTS** the government's motion to dismiss.

I. Background

On February 5, 1997, Petitioner Wheeler pled guilty to a six-count indictment.⁶ The indictment charged him with destroying a motor vehicle by means of an explosive device, thereby causing his wife Rhonda Wheeler's death, and included several violations of [§ 924\(c\)\(1\)](#).⁷ Under [§ 924\(c\)\(1\)](#), a defendant faces a mandatory minimum sentence if he is

¹ Doc. [74](#).

² [135 S. Ct. 2551 \(2015\)](#).

³ Doc. [74](#) at 12.

⁴ Doc. [77](#).

⁵ Doc. [79](#).

⁶ Doc. 34.

⁷ Doc. 9.

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convicted of using, carrying, and brandishing a firearm in relation to a “crime of violence.”⁸

Section 924(c) defines “crime of violence” as a felony that

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.⁹

The first prong is called the “force clause,” and the second prong is called the “residual clause.”

Wheeler’s indictment did not implicate the “violent felony” mandatory-minimum sentencing provision of the Armed Career Criminal Act (“ACCA”), [18 U.S.C. § 924\(e\)](#).

On June 11, 1997, the district court sentenced Wheeler to two consecutive life sentences and five years of supervised release.¹⁰ The Sixth Circuit affirmed Wheeler’s conviction and sentence on November 13, 1998.¹¹

Wheeler filed an initial § 2255 motion to vacate or correct his sentence on February 22, 2000, alleging ineffective assistance of counsel.¹² The district court denied his petition and denied a certificate of appealability.¹³ On December 12, 2005, Wheeler filed a motion to correct an incorrect and/or erroneous interpretation of the law under [Fed. R. Civ. P. 60\(b\)\(6\)](#).¹⁴ Among other reasons, the district court denied the motion because, even if construed as a § 2255 motion, Wheeler had not obtained permission from the Court of Appeals for a successive petition.¹⁵

Wheeler filed another § 2255 motion to vacate, set aside, or correct a sentence on December 29,

⁸ [18 U.S.C. § 924\(c\)\(1\)\(A\)](#).

⁹ [18 U.S.C. § 924\(c\)\(3\)](#).

¹⁰ Doc. 45.

¹¹ Doc. 58.

¹² Doc. 60.

¹³ Doc. 63.

¹⁴ Doc. [65](#).

¹⁵ Doc. [67](#).

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2014,¹⁶ but the Sixth Circuit denied his application to file a second or successive §2255 petition.¹⁷

On May 11, 2016, Wheeler filed an application with the Sixth Circuit to file a third or successive § 2255 petition. Wheeler filed the instant § 2255 petition on June 14, 2016.¹⁸ The Sixth Circuit denied Wheeler's motion for authorization to file a successive § 2255 petition on September 7, 2016.¹⁹ The next day, the government filed a motion to dismiss Wheeler's successive § 2255 petition.²⁰

II. Legal Standard

[Section 2255](#) gives a federal prisoner post-conviction means of collaterally attacking a conviction or sentence that he alleges violates federal law. Section 2255 provides four grounds upon which a federal prisoner may challenge his conviction or sentence:

- 1) That the sentence was imposed in violation of the Constitution or laws of the United States;
- 2) That the court was without jurisdiction to impose such sentence;
- 3) That the sentence exceeded the maximum authorized by law; or
- 4) That the sentence is otherwise subject to collateral attack.²¹

To prevail on a [§ 2255](#) motion alleging a constitutional error, the movant “must establish an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings.”²²

On June 26, 2015, the Supreme Court issued the *Johnson* opinion, holding that the definition of “violent felony” in the ACCA’s § 924(e) residual clause was unconstitutionally

¹⁶ Doc. [68](#).

¹⁷ Doc. [73](#).

¹⁸ Doc. [74](#).

¹⁹ Doc. [79-1](#).

²⁰ Doc. [79](#).

²¹ [28 U.S.C. § 2255\(a\)](#).

²² [Watson v. United States](#), 165 F.3d 486, 488 (6th Cir. 1999) (citing [Brecht v. Abrahamson](#), 507 U.S. 619, 637-38 (1993)).

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vague.²³ As a result, predicate felonies under the residual clause cannot be the basis for sentencing under the ACCA. *Johnson* does not address the constitutionality of the § 924(c) residual clause, under which Wheeler was convicted.

III. Discussion

Petitioner Wheeler argues that because the § 924(c)(3)(B) residual clause under which he was convicted is “substantially similar” to the § 924(e) residual clause invalidated by *Johnson*, this Court must vacate his § 924(c) convictions and sentence.²⁴ Wheeler’s argument loses.

First, Wheeler lacks appellate authorization to file his successive § 2255 petition. “A federal prisoner cannot file a second or successive § 2255 motion to vacate in the district court unless the prisoner first obtains permission to do so from the court of appeals.”²⁵ Wheeler has filed § 2255 petitions in February 2000²⁶ and December 2014,²⁷ so his June 2016 petition requires Sixth Circuit authorization. On September 7, 2016, the Sixth Circuit denied Wheeler’s motion for authorization to file a second or successive motion to vacate.²⁸ Therefore, this Court cannot hear Wheeler’s successive § 2255 petition.

Second, Petitioner Wheeler’s *Johnson* argument fails on the merits. Wheeler argues that, in light of *Johnson*, his convictions under § 924(c) are invalid because the § 924(c)(3)(B) “residual clause” is unconstitutionally vague. Wheeler’s argument loses because the § 924(c)(3)(B) residual clause remains constitutional after *Johnson*, and therefore the residual clause sustains his conviction under § 924(c). In *Johnson*, the Supreme Court only addressed the ACCA’s “residual clause” under § 924(e) and its definition of “violent felony.”²⁹ The ACCA’s

²³ [135 S. Ct. at 2563](#).

²⁴ Doc. [74](#) at 12-14.

²⁵ *In re Green*, 144 F.3d 384, 388 (6th Cir. 1998).

²⁶ Doc. 60.

²⁷ Doc. [68](#).

²⁸ Doc. [79-1](#).

²⁹ [135 S. Ct. at 2563](#).

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residual clause under § 924(e) is distinct from the residual clause under which Wheeler was convicted, § 924(c)(3)(B).³⁰ The Sixth Circuit recently rejected the claim that *Johnson* rendered § 924(c)(3)(B) unconstitutionally vague, emphasizing the different statutory language and judicial interpretations of the § 924(c)(3) and § 924(e) residual clauses.³¹ Accordingly, *Johnson* does not invalidate the § 924(c)(3) residual clause or present valid grounds for vacating Wheeler's conviction under the same.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Wheeler's successive § 2255 petition and **GRANTS** the government's motion to dismiss. Moreover, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and no basis exists upon which to issue a certificate of appealability.³²

IT IS SO ORDERED.

Dated: October 13, 2016

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

³⁰ Compare 18 U.S.C. § 924(c)(3) (defining "crime of violence" as a felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that *by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense*") (emphasis added) with 18 U.S.C. § 924(e)(2)(B)(ii) (defining, in part, a "violent felony" as a felony that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*") (emphasis added).

³¹ *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016); see also *United States v. Hill*, No. 14-3872-CR, 2016 WL 4120667, at *10 (2d Cir. Aug. 3, 2016) (holding that § 924(c)(3)(B) residual clause remained constitutional after *Johnson*).

³² 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).